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Nebraska Usury Statutes, the Time Price Sale Transaction, and the Installment Sales Act: An Analysis of Nebraska Finance Law

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Comments

NEBRASKA USURY STATUTES, THE TIME PRICE SALE TRANSACTION, AND THE INSTALLMENT SALES ACT

An Analysis of Nebraska Finance Law

I. INTRODUCTION

Ever since territorial days¹ an ever growing body of statutes relating to the law of usury has been accumulating in Nebraska until today there is found an example of each of the several kinds of usury statutes commonly found in other states. Litigation under the various acts has been plentiful, especially in the area of the distinction between the time price sale and the loan. As a result the varied rules and interpretations developed both legislatively and judicially have, over the years, become somewhat confusing and conflicting.

The purpose here is to discuss the various statutes and their coverage and application, to reconcile statutory conflicts, and to interpret the statutes in the light of the decided cases. For convenience and clarity the provisions found in the Nebraska Revised Statutes of 1943, as amended, sections 45-101 through 45-113 will be referred to as the General Usury Act;² sections 45-114 through 45-158 as the Installment Loan Act;³ sections 45-201 through 45-203 as the Revolving Charge Agreements Act;⁴ sections 45-301 through 45-312 as the Nebraska Installment Sales Act;⁵ sections 8-418

¹ NEB. REV. STAT. §§ 28-1 to -10 (1866); (Citation for historical purposes only).

² NEB. REV. STAT. §§ 45-101 to -13 (Reissue 1960), hereafter referred to only by section number in the text.

³ NEB. REV. STAT. §§ 45-114 to -58 (Reissue 1960), hereafter referred to only by section number in the text.

⁴ NEB. REV. STAT. §§ 45-201 to -03 (Reissue 1960), hereafter referred to only by section number in the text.

⁵ NEB. REV. STAT. §§ 45-301 to -12 (Reissue 1960), hereafter referred to only by section number in the text.

through 8-433 as the Industrial Loan Act;⁶ and sections 8-801 through 8-814 as the Personal Loan Act.⁷ The Nebraska statutes will be referred to hereafter in the text only by section number. In view of their similar purposes and provisions, the recently enacted Nebraska Installment Sales Act and the Revolving Charge Agreements Act will be discussed in like manner as the previously enacted usury statutes.

II. THE GENERAL USURY ACT

A. THE ACT GENERALLY

The basis of Nebraska usury law is the General Usury Act found in sections 45-101 through 45-113. The Act is general in application, applying to all loans and forbearances of money by whomever made unless a statutory exception is made or there is a repeal by implication. Section 45-101 specifically exempts installment loan licensees under sections 45-114 to 45-155, industrial loan and investment companies under sections 8-401 to 8-417, registered banks under section 8-801 to 8-814, and credit unions under sections 21-1701 to 21-1753. Building and loan associations are specifically included by section 8-330.

The contract maximum under the General Usury Act is nine per cent,⁸ the non-contract maximum is six per cent,⁹ and unsettled accounts and money due bears interest at six per cent.¹⁰ The rates allowed under section 45-101 may be received in advance and the cases have held that ordinary bankers' discount on the amount of the note at the maximum rate does not violate the Act.¹¹ The Act says nothing concerning compound interest, but it has been held

⁶ NEB. REV. STAT. §§ 8-418 to -33 (Reissue 1954). The following sections have been more recently amended: NEB. REV. STAT. §§ 8-418, -425, -429, and -432 (Supp. 1959). The Act is hereafter referred to only by section number in the text.

⁷ NEB. REV. STAT. §§ 8-801 to -14 (Reissue 1954). The following sections have been more recently amended: NEB. REV. STAT. §§ 8-801, -807, and -809 (Supp. 1959). The Act is hereafter referred to only by section number in the text.

⁸ NEB. REV. STAT. § 45-101 (Reissue 1960).

⁹ NEB. REV. STAT. § 45-102 (Reissue 1960).

¹⁰ NEB. REV. STAT. § 45-104 (Reissue 1960).

¹¹ *Steen v. Stretch*, 50 Neb. 572, 70 N.W. 48 (1897); *Rose v. Munford*, 36 Neb. 148, 54 N.W. 129 (1893). It is submitted that these cases proceed upon a misinterpretation of section 45-101. A \$100 note due one year

that compound interest is permissible only when not in excess of the maximum rate computed as simple interest.¹² If the maximum rates are exceeded the loan contract is not for that reason void, but if proof of the illegal interest is made the lender may recover only the principal.¹³

Although the General Usury Act does not so provide, the Nebraska Supreme Court has uniformly held proof of intent a necessary requirement.¹⁴ The intent necessary is not a specific intent to violate the statute but merely an intent to take more than the rate fixed by law.¹⁵ Both parties must concur in this intent¹⁶—the borrower to give and the lender to receive. This intent must be clearly shown unless the usury appears on the face of the instrument in which case the instrument alone proves the usury.

Section 45-112 provides that "Relief to the complaining party in case of an usurious loan may be given without payment or tender by him of the principal sum." It is to be observed first that this section does not require the court to give relief without tender of payment; but appears to leave that within its sound discretion. Since the General Usury Act requires only forfeiture of interest it would in some cases be perfectly proper, therefore, to require tender of the principal if that would facilitate settling the whole controversy in the one action. Equity has frequently required this under circumstances where the borrower would still have to pay the principal even though he prevailed in the action.¹⁷ On the other hand, in those cases where the controversy cannot be settled in one action, tender of the principal should not be required. Secondly, this section does not appear to be limited to loans made under the

hence, discounted at inception for \$91, exceeds the 9% maximum because the amount of the loan is the amount received by the borrower or \$91, not \$100, the amount of the note. The maximum allowable discount turns out to be \$8.26. (9% of \$91.74 is \$8.26 and \$91.74 plus \$8.26 is \$100).

¹² *Sandford v. Lundquist*, 80 Neb. 414, 118 N.W. 129 (1907), vacating 80 Neb. 408, 114 N.W. 279 (1907); *Richardson v. Campbell*, 34 Neb. 181, 51 N.W. 753 (1892).

¹³ NEB. REV. STAT. § 45-105 (Reissue 1960).

¹⁴ *Rose v. Munford*, 36 Neb. 148, 54 N.W. 129 (1893); *New England Mortgage Security Co. v. Sandford*, 16 Neb. 689, 21 N.W. 394 (1884); *Loucks v. Smith*, 154 Neb. 594, 48 N.W.2d 727 (1951).

¹⁵ *Bank of United States v. Waggner*, 34 U.S. (9 Pet.) 378 (1835).

¹⁶ *Loucks v. Smith*, 154 Neb. 597, 48 N.W.2d 722 (1951); *Rose v. Munford*, 36 Neb. 148, 54 N.W. 129 (1893).

¹⁷ *Eisaman v. Gallagher*, 24 Neb. 79, 37 N.W. 941 (1888); *Gund v. Ballard*, 73 Neb. 547, 103 N.W. 309 (1905); *Bolen v. Wright*, 89 Neb. 116, 131 N.W. 185 (1911).

General Usury Act. It would appear to apply to all loans including those made under the other loan acts as no inconsistent or limiting provisions appear in them. These other loan acts are also usury acts as hereinafter more fully discussed.

There is no provision in the General Usury Act specifically prohibiting the use of subterfuge or device for the purpose of increasing the rate of interest above the legal rate. The prevailing view, however, is that such methods really add to the interest rate making the loan usurious.¹⁸ The rule seems to be that neither may the lender require the borrower to pay him any amount above the legal rate by any subterfuge nor may he require him to pay the lender's just expenses or any amount to a third party which the lender should justly pay. In other words, the transaction is viewed from the standpoint of what the borrower must pay and not what the lender receives.

Perhaps the most common though usurious practice today is that of adding interest at the maximum rate to the principal of the loan and dividing the total by the number of payments to be made.¹⁹ Consider for instance a loan of \$100 to be paid off in monthly installments over a period of one year with interest at the maximum rate of nine per cent. It is to be observed that in this situation nine per cent is an actual interest rate of eighteen per cent on the amount loaned over the period. The loan is clearly usurious because it is paid off in installments, the borrower having the use of the full amount for only the short period of one month. The average balance loaned is fifty dollars.

B. USURY IN THE TIME PRICE SALE FINANCING TRANSACTION

In order for the General Usury Act to apply there must be either a loan or a forbearance.²⁰ A loan under the usury statutes is generally thought of as an advancement of money by one person to another under an express or implied contract that the latter will

¹⁸ *Commonwealth Co. v. Fauver*, 169 Neb. 795, 101 N.W.2d 150 (1960); *Jourdan v. Commonwealth Co.*, 169 Neb. 482, 100 N.W.2d 84 (1959); *Moore v. Union Mutual Life Ins. Co.*, 17 Fed. Cas. 703 (No. 9777) (C.C. Neb. 1876); *Missouri Valley Life Ins. Co. v. Kittle*, 2 Fed. 113 (C.C. Neb. 1880). For a discussion of various subterfuges see HUBACHEK, *ANNOTATIONS ON SMALL LOAN LAWS* 145-174 (1938).

¹⁹ *Connor v. Miner*, 109 Cal. App. 770, 288 Pac. 23 (App. Dep't Super. Ct. 1930); *Columbus Indus. Bank v. Rosenblatt*, 111 Conn. 84, 149 Atl. 209 (1930). See also HUBACHEK, *op. cit. supra* note 18, at 146-52.

²⁰ NEB. REV. STAT. § 45-101 (Reissue 1960).

repay it at some future time together with such additional sum as may be agreed upon for the use of the money advanced.²¹ A forbearance, on the other hand, signifies a contractual obligation of a creditor or lender to refrain for a stipulated period of time from requiring the debtor or borrower to pay a loan or debt then due and payable, the consideration being that upon maturity of the forbearance the lender or creditor is to receive an additional sum of money.²² In the loan there is an advancement of money while in the forbearance there is not. In the forbearance there is a presently due debt while in the loan there is not. Both rest upon a contractual relation and both may provide for interest which is that compensation paid by the borrower in addition to repayment of the principal obligation for the time benefit he has received.²³ Thus usury is contracting for or receiving something in excess of the amount of interest allowed by law for a loan or forbearance of money.²⁴

The time price sale is simply an ordinary sale transaction with the additional characteristic that the seller charges a higher price for the chattel to compensate for allowing payment of the purchase price in installments. It is generally held that such transactions are not within the usury laws even though the difference between the cash and the time price exceeds lawful interest for a loan.²⁵ The reasons frequently given are that there could be first of all no loan because no loan was intended and no money advanced, the parties having rather made a sale of a chattel which, of course, they could do upon mutually agreeable terms. They had together merely stipulated how the purchase price was to be paid. Secondly, there is no forbearance because there is no indebtedness existing between the parties to the contract at the time it is made nor does the contract provide for the exaction of any additional consideration for extending the time of payment of any of the installments. The contract simply provides the terms upon which the seller is willing

²¹ *Hafer v. Spaeth*, 22 Wash. 2d 378, 156 P.2d 408 (1945); *O. A. Graybeal Co. v. Cook*, 111 Cal. App. 518, 295 Pac. 1088 (Dist. Ct. App. 1931).

²² *Hafer v. Spaeth*, 22 Wash. 2d 378, 156 P.2d 408 (1945); *O. A. Graybeal Co. v. Cook*, 111 Cal. App. 518, 295 Pac. 1088 (Dist. Ct. App. 1931).

²³ *Peters Trust Co. v. Hecht*, 118 Neb. 390, 224 N.W. 866 (1929).

²⁴ *Loucks v. Smith*, 154 Neb. 597, 48 N.W.2d 722 (1951).

²⁵ *Hogg v. Ruffner*, 66 U.S. (1 Black) 115 (1861); *Grand Island Finance Co. v. Fowler*, 124 Neb. 514, 247 N.W. 429 (1933); *American Loan Plan v. Frazell*, 135 Neb. 718, 283 N.W. 836 (1939); see Annot., 48 A.L.R. 1442 (1927) supplemented in 57 A.L.R. 880 (1928); Annot., 143 A.L.R. 244 (1943).

to sell and upon which the buyer is willing to buy. It does not exact a consideration for the extension of time for payment of an existing or prospective indebtedness.²⁶ The usury statutes strike at exaction of more than a specified rate for the use of money and are not intended to apply to the sale prices of chattels.

Though the seller may sell his goods for whatever price he likes to whomever he likes and at whatever price he likes, the courts will scrutinize the transaction to see at what price the goods were actually sold. The case will not be judged by what the parties appear to be or represent themselves to be doing, and if the transaction as disclosed by all the evidence amounts in substance to a contracting for or receiving of usurious interest upon a loan or forbearance upon a lower price than represented it will be treated as such.²⁷ So it is now generally held that the buyer must be informed of and given an opportunity to choose between a time sales price and a cash sales price.²⁸ If this is not done the cash price will be considered the sale price. A possible reason for this requirement could be that since ordinary business experience tells us that the parties to sales transactions intend to agree upon a price known to both and since the only price known to the buyer here is the cash price, the price the parties must have agreed upon is the cash price. Since the parties then are deemed to have agreed upon the cash price the forbearance is on that amount rather than on any time price computed in the written contract.²⁹

²⁶ *Hafer v. Spaeth*, 22 Wash. 2d 378, 156 P.2d 408 (1945); *Thomas v. Knickerbocker Operating Co.*, 202 Misc. 286, 108 N.Y.S.2d 234 (Sup. Ct. 1951); see Annot., 91 A.L.R. 1105 (1934).

²⁷ *Powell v. Edwards*, 162 Neb. 11, 75 N.W.2d 122 (1956); *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956) and 168 Neb. 298, 96 N.W.2d 55 (1959).

²⁸ *McNish v. General Credit Corp.*, 164 Neb. 526, 83 N.W.2d 1 (1957); *McNish v. Grand Island Finance Co.*, 164 Neb. 543, 83 N.W.2d 13 (1957); *Nelson v. General Credit Corp.*, 166 Neb. 770, 90 N.W.2d 799 (1958); *Curtis v. Securities Acceptance Corp.*, 166 Neb. 815, 91 N.W.2d 19 (1958); *State ex rel. Beck v. Associates Discount Corp.*, 168 Neb. 298, 96 N.W.2d 55 (1959); *Thompson v. Commercial Credit Equip. Corp.*, 169 Neb. 377, 99 N.W.2d 761 (1959); *Robb v. Central Credit Corp.*, 169 Neb. 505, 100 N.W.2d 57 (1959).

²⁹ The cases in note 28 *supra* all involved time price sale situations in which no time price was quoted. Would the seller be required to state a cash price if he chooses to sell only on time and quotes only the time price? The cases probably do not so hold for in this circumstance there is no deception as to the price of the chattel whereas when only a cash price is quoted the representation is that the bargaining is being done on this price. Quotation of the time price is the important thing.

Suppose now it is determined at what price the chattel was sold whether it be a cash or a time price. The mere fact that there is a sale at a valid time price does not negative the presence of usury when there is an additional charge above the time price as a compensation for forbearance.³⁰ Any additional compensation for forbearance is subject to the usury laws in like manner as the ordinary loan as well as any subterfuge for an increase of rate such as charging the maximum rate on the entire amount for the entire time while at the same time the loan is being paid off in installments. One explanation for this could be that there are here in actuality two transactions, first a sale at a time price, and second a loan to finance the amount of that time sales price. The sale contract is complete and executed at the time the loan to finance the time sales price is made. The buyer is a borrower of the amount of the time price less whatever down payment he has made. Another way of viewing the same transaction would be to say that there really never was a time sale contract, but rather there was from the beginning a loan involved at a price agreed upon. The parties having agreed upon a time price the principal of the loan is that amount. Whichever view is adopted the result is the same, the latter, however, being the reasoning most generally adopted.³¹

There are here two variables from which the seller's profits come. First, the additional charge he makes for his product is to compensate him for the additional risk of selling on time. This relates only to the question concerning at what price the sale was actually made for the purpose of determining the basis upon which interest is to be computed. Secondly, there is the interest on the forbearance computed on the time price. This is subject to usury regulation.³² As between the two figures it is clear that the seller can juggle the two elements in such a way as to avoid the usury statutes without greatly affecting his business profits. Indeed, he might find it unnecessary to charge interest relying rather upon the time price differential as a means to profit. Thus it is also clear that the parties may by mere agreement so draft the contract that

³⁰ *Powell v. Edwards*, 162 Neb. 11, 75 N.W.2d 122 (1956); *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956) and 168 Neb. 298, 96 N.W.2d 55 (1959).

³¹ *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956) and 168 Neb. 298, 96 N.W.2d 55 (1959); *Powell v. Edwards*, 162 Neb. 11, 75 N.W.2d 122 (1956).

³² *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956) and 168 Neb. 298, 96 N.W.2d 55 (1959); *Powell v. Edwards*, 162 Neb. 11, 75 N.W.2d 122 (1956).

it either is or is not governed by the usury laws and may submit the contract to partial regulation should they so desire.

In the usual transaction the seller requires a promissory note of the buyer either because of present intent to discount or such possible future intention. Since all transactions involving time price sale elements also involve elements of forbearance in so far as additional charges are made and are to this extent subject to the usury laws, it follows that notes when given for the amount of the time price are at least in that amount subject to usury regulation, any additional amount being likewise interest on a forbearance. It also follows that the fact that a note is given will not prevent the court from looking into the genuineness of the time sales price. As we have seen, if it is determined that the cash price rather than the time sales price was the actual sale price the difference between the two will likewise be within the usury laws.

Suppose now the note is given on a cash price. Will the amount of the note be considered the principal of the forbearance over the contention that part or all of what appears as interest really is the difference between a time and a cash price? Here in any event the seller would certainly have the burden of disproving usury rather than the buyer of proving usury because the instrument appears usurious on its face. Furthermore this burden would be nearly insurmountable as the instrument itself is a showing of intention that the loan is on the cash price. Recognizing this, the Nebraska decisions clearly state that in such a case a loan upon the cash price is to be inferred.³³ The result of all this is that interest on a note is invariably within the usury laws and the amount of the principal on the face of the note represents a loan. Of course the loan may in fact be for a much smaller amount subjecting even some of the purported principal to the usury laws.

Frequently the seller cannot engage in the financing business due to insufficient capital or need of ready cash. He thus depends on being able to readily discount the paper to third parties. The seller may yet find it impossible to sell the paper to a discount company unless he does so at a price which will return to the dis-

³³ "It is not a time sale if a car dealer, in selling a car, actually agrees with the buyer that he will finance (take care of) the balance of the cash purchase price agreed upon and does so, either directly or through others Such a transaction would be a loan to finance the balance of the cash purchase price" *State ex rel. Beck v. Associates Discount Corp.*, 168 Neb. 298, 309, 96 N.W.2d 55, 66 (1959). See also *Robb v. Central Credit Corp.*, 169 Neb. 505, 100 N.W.2d 57 (1959); *Thompson v. Commercial Credit Equip. Corp.*, 169 Neb. 377, 99 N.W.2d 761 (1959).

count company greater profits than would be allowed by the usury laws. Thus being unwilling to part with his paper at a price insufficient to return at least his expected cash price the seller resorts to time price sale financing thereby allowing him to discount the paper at a higher rate.

The question then becomes one of whether the discount is subject to usury regulation. The cases uniformly hold that it is not even though the seller may have intended to discount the paper at the time he took it. Usury is determined as of the time of inception, that is, we look at the contract of loan as of the time it became a legal obligation. Subsequent discount or sale of the obligation is not governed by the usury laws.³⁴ This state of affairs and the fact that so many chattel purchases require financing has resulted in a wide spread use of the time price sale actually for the benefit of the discount companies—enabling them to avoid the sanctions of the usury laws by directing their business efforts toward buying discount paper rather than making direct loans.

Since the time price sale transaction upon discount partakes of something similar to a loan and takes the place of loan transactions in many instances it is to be expected that some of the same practices will be engaged in as are engaged in when a loan is made. Thus the discount company may make a credit check on the buyer, it may furnish contract forms and discount tables, it may give instructions as to how to use them, and it may supervise the redraft and renegotiation of unacceptable time price sale agreements. All this is done with the expectation of eventually buying a completed and favorable contract. As can readily be seen the execution and delivery of the instrument from the buyer to the seller and the subsequent negotiation to a discount company easily becomes nothing but a mask for a loan at a cash price.

Formerly, under *Grand Island Finance Co. v. Fowler*,³⁵ nearly all participation by the discount company was sanctioned, the genuineness of the time price sale not being inquired into even under circumstances where the buyer could well conclude that he was borrowing money directly from the discount company. In fact the buyer's very knowledge of the discount company's participation in

³⁴ NEB. REV. STAT. § 45-101 (Reissue 1960); *Nichols v. Fearson*, 32 U.S. (7 Pet.) 103 (1833); *Grand Island Finance Co. v. Fowler*, 124 Neb. 514, 247 N.W. 429 (1933); *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956). For a discussion of the reasons behind the theory see *Durant v. Banta*, 27 N.J.L. 624 (Ct. Err. & App. 1858).

³⁵ 124 Neb. 514, 247 N.W. 429 (1933).

effect estopped the buyer from denying that there was a valid time price sale.³⁶

*Powell v. Edwards*³⁷ and *State ex rel. Beck v. Associates Discount Corp.*,³⁸ while both were decided under the Installment Loan Act, are applicable here as well. These cases, while not overruling the basic principles of *Grand Island Finance Co. v. Fowler*,³⁹ do require a much closer look into the so called tripartite dealings between the buyer, seller, and prospective indorsee of the contract. The recent Nebraska decisions emphasize the principle that the transaction between the buyer and the seller must be a completed *bona fide* time price sale agreement before assignment to a third party.⁴⁰ In other words, there must be two actually independent transactions: first, the sale on time, and second, an assignment or sale of the contract by the seller to a third person. These two transactions, separate in form, if merged into one tripartite arrangement are in substance loans direct from the discount company to the buyer to finance the cash purchase price. The reason for this holding could well be explained by saying that the direct participation by the discount company in the original negotiations between the buyer and the seller is the actual equivalent of loan bargaining between the buyer and the discount company. The seller is in reality in the position of an agent. The resulting loan has no inception until discount of the paper to the finance company. This loan is upon a cash price because the finance company not the seller absorbs the cost of extending credit. The finance company discharges the buyer's obligation to pay the purchase price to the seller. In return the buyer promises to make certain stipulated payments to the finance company.

A distinction is made which appears to rest upon whether a buyer knows of or could possibly be dealing directly with the finance company. Those participations of which the buyer does not know or which cannot amount to bargaining between the buyer and the finance company are sanctioned. Thus, direct participation in the negotiations, such as actually helping the parties bargain,

³⁶ See also *American Loan Plan v. Frazell*, 135 Neb. 718, 283 N.W. 836 (1939).

³⁷ 162 Neb. 11, 75 N.W.2d 122 (1956).

³⁸ 162 Neb. 683, 77 N.W.2d 215 (1956).

³⁹ *Grand Island Finance Co. v. Fowler*, 124 Neb. 514, 247 N.W. 429 (1933).

⁴⁰ *Curtis v. Securities Acceptance Corp.*, 166 Neb. 815, 91 N.W.2d 19 (1958); *Nelson v. General Credit Corp.*, 166 Neb. 770, 90 N.W.2d 799 (1958); *McNish v. General Credit Corp.*, 164 Neb. 526, 83 N.W.2d 1 (1957); *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956).

either in person or by telephone, or helping the parties with the redraft and renegotiation of a contract in exchange for cancellation of a prior one which the discount company thinks unacceptable, would now no doubt be held by the Court to result in loan transactions.⁴¹ On the other hand, indirect influence or participation by the discount company, such as furnishing the buyer and seller his approved contract form, is allowed.⁴² The Court has also uniformly allowed the finance company to furnish discount schedules to the seller⁴³ enabling him to compute and quote to the buyer a time price sufficiently high to return the expected cash price and yet induce the finance company to purchase the paper.

The advisability of allowing the finance company to participate to the extent of supplying discount schedules may be questioned. Businessmen regard themselves morally bound by them. The buyer is in fact actually from the beginning looking to the finance company for financial help knowing that the sale will not go through without its approval. The existence of a contract between the buyer and the seller thus really depends on the condition that the seller be able to successfully assign it, and the discount schedules are furnished for the purpose of assuring such an assignment.⁴⁴

As can readily be seen the validity of the time sales price will depend upon many factors all of which are subject to oral proof. The situation is also complicated by the fact that while the cases state that the seller may in "good faith" sell on time at a price in excess of a cash price without tainting the transaction with usury⁴⁵

⁴¹ See cases cited in note 40 *supra*; *Powell v. Edwards*, 162 Neb. 11, 75 N.W.2d 122 (1956).

⁴² *Nelson v. General Credit Corp.*, 166 Neb. 770, 90 N.W.2d 799 (1958); *Powell v. Edwards*, 162 Neb. 11, 75 N.W.2d 122 (1956); *American Loan Plan v. Frazell*, 135 Neb. 718, 283 N.W. 836 (1939); *Grand Island Finance Co. v. Fowler*, 124 Neb. 514, 247 N.W. 429 (1933).

⁴³ See cases cited in note 42 *supra*; *Commonwealth Co. v. Fauver*, 169 Neb. 795, 101 N.W.2d 150 (1960); *Thompson v. Commercial Credit Equip. Corp.*, 169 Neb. 377, 99 N.W.2d 761 (1959); *Curtis v. Securities Acceptance Corp.*, 166 Neb. 815, 91 N.W.2d 19 (1958); *McNish v. General Credit Corp.*, 164 Neb. 526, 83 N.W.2d 1 (1957); *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956) and 168 Neb. 298, 96 N.W.2d 55 (1959).

⁴⁴ This can be seen from the cases where the contract was redrafted to suit the finance company. *Powell v. Edwards*, 162 Neb. 11, 75 N.W.2d 122 (1956); *American Loan Plan v. Frazell*, 135 Neb. 718, 283 N.W. 836 (1939).

⁴⁵ See cases cited in notes 42 and 43 *supra*.

yet no one knows precisely at what point the difference between a cash price and credit price becomes so large as to be in bad faith. The courts seem never to have attempted to apply this test to determine the genuineness of the time price. The problem is herein more fully discussed in connection with the Nebraska Installment Sales Act.

III. LOAN EXCEPTIONS TO THE GENERAL USURY ACT

A. THE INSTALLMENT LOAN ACT

1. *Application Generally*

As noted earlier, the General Usury Act excepts installment loan licensees from its operation.⁴⁶ The Installment Loan Act found in section 45-114 through 45-155 applies to licensees and loans made by them under the Act and to extensions of time upon those loans. Installment loan licensees may be either individuals or corporations; banks and trust companies are not, however, eligible,⁴⁷ and remain subject to the General Usury Act or the Personal Loan Act instead.

The maximum rates allowed under the Installment Loan Act are expressed in terms of graduations according to the size of the loan. That part of the unpaid principal balance less than \$150 may draw interest not to exceed thirty-six per cent; that part of the unpaid principal balance in excess of \$150 but less than \$300 may earn charges not to exceed thirty per cent; and that part of the unpaid principal balance in excess of \$300 may bear interest not to exceed nine per cent. The charges may not be paid, deducted, or received in advance and may not be compounded unless the consideration for the loan is the unpaid principal balance of a prior loan, in which case the new loan may include charges accruing within sixty days before the making of the new loan.⁴⁸ If, however, the aggregate indebtedness of the borrower exceeds \$3,000, the rate may not exceed nine per cent upon any part of any loan.⁴⁹ In addition, no further amount can be charged directly or indirectly and the loan may not be split for the purpose of exacting a higher rate.⁵⁰ Thus it can be seen that the time price sale problem is here

⁴⁶ NEB. REV. STAT. § 45-101 (Reissue 1960).

⁴⁷ NEB. REV. STAT. § 8-803 (Reissue 1954).

⁴⁸ NEB. REV. STAT. § 45-137 (Reissue 1960).

⁴⁹ NEB. REV. STAT. § 45-138 (Reissue 1960).

⁵⁰ NEB. REV. STAT. § 45-137 (Reissue 1960); *Nitzel & Co. v. Nelson*, 144 Neb. 662, 14 N.W.2d 197 (1944).

similar to that under the General Usury Act as are also other subterfuges for overcharge of interest. If any amount greater than that allowed is charged, either knowingly or without the exercise of due care,⁵¹ unless as a result of accidental and *bona fide* errors in computation,⁵² the contract is void,⁵³ and the indebtedness is void.⁵⁴ In other words, the debt is cancelled, and the borrower no longer owes it.

2. *The Installment Loan Act Applied to Non-licensees*

After the holding in *Powell v. Edwards*⁵⁵ that the time price sale contracts there made were in substance loans to pay the cash price, there remained the problem of determining what penalties to apply. The court applied the penalties of the Installment Loan Act and not those of the General Usury Act, reasoning that since the language found in section 45-153—making any person or organization violating the provisions of sections 45-138 to 45-145 guilty of a misdemeanor—applies by its plain words to both licensees and non-licensees and since it would be unreasonable to suppose that non-licensees are free to engage in practices barred to licensees, the civil forfeitures found in section 45-154 which make the contract void must also apply to non-licensees.

It is submitted that the court misapplied the Installment Loan Act in this respect,⁵⁶ having failed to observe first of all that all those sections to which section 45-153 refers concern only licensees and do not suggest application to non-licensees. Secondly, the Installment Loan Act was never intended to be applied to non-licensees, its theory being that in exchange for the privilege of charging a higher interest rate on small loans the finance company should submit to more stringent regulation.⁵⁷ The non-licensee does not submit to more stringent regulation. Thirdly, even though the court finds that the time sale price is not valid as such, the contract does not become a loan since there was no advancement of money but rather a forbearance for a consideration upon the presently due cash price. The Installment Loan Act applies only to

⁵¹ NEB. REV. STAT. § 45-138 (Reissue 1960).

⁵² NEB. REV. STAT. § 45-137 (Reissue 1960).

⁵³ NEB. REV. STAT. §§ 45-137, -138, and -154 (Reissue 1960).

⁵⁴ NEB. REV. STAT. § 45-155 (Reissue 1960).

⁵⁵ 162 Neb. 11, 75 N.W.2d 122 (1956).

⁵⁶ *Contra*, OPS. NEB. ATT'Y GEN. 546 (1941).

⁵⁷ *Abel v. Conover*, 170 Neb. 926, 935, 104 N.W.2d 684, 691 (1960).

loans of money and renewals thereof which involve an original advancement of money; it does not speak of forbearances. Fourthly, the non-licensee clearly remains subject to the General Usury Act for the above reasons and also because the General Usury Act excepts only licensees from its operation.⁵⁸

Perhaps there is an alternative explanation for *Powell v. Edwards*.⁵⁹ Non-licensees are prevented by section 45-128 from engaging in the businesses allowed to licensees with intent to evade the provisions of the Installment Loan Act. Section 45-155 renders indebtedness thus created void.⁶⁰ The question now becomes one of whether sufficient intent to evade the Installment Loan Act was shown.

In view of the purpose of the Installment Loan Act and the fact that it was passed at a time when the time price sale contract exception to the General Usury Act was in its prime, it would seem incorrect to suppose that the Legislature intended the mere making of a time price sale to be automatically a showing of sufficient intent within section 45-128. If the legislature had so intended it surely would have under the circumstances used language specifically covering the problem. That the court does not view all the time price sale contracts as attempts to evade the provisions of the Loan Acts can be seen from *Commonwealth Co. v. Fauver*,⁶¹ a holding demonstrating that the finance company could still win on an argument that a valid time price sale had been made.

*Powell v. Edwards*⁶² cannot be explained on the basis of section 45-128 because it neither cites that section nor inquires into whether sufficient necessary intent to evade was found. *State ex rel. Beck v. Associates Discount Corp.*⁶³ also cannot be explained upon the plain words of section 45-128. Here the court interpreted section 45-128 to mean that the inhibitory provisions of the Installment Loan Act apply to non-licensees and sent the case back for trial upon that theory disregarding the section 45-128 requirement that an intent to evade the provisions of the Installment Loan Act be shown. The holding is, however, firmly entrenched in Nebraska.⁶⁴

⁵⁸ NEB. REV. STAT. § 45-101 (Reissue 1960).

⁵⁹ 162 Neb. 11, 75 N.W.2d 122 (1956).

⁶⁰ NEB. REV. STAT. §§ 45-128 and -155 (Reissue 1960) were, when enacted, parts of the same section of the original act. See Neb. Laws c. 90, § 14 (1941).

⁶¹ 169 Neb. 795, 101 N.W.2d 150 (1960).

⁶² 162 Neb. 11, 75 N.W.2d 122 (1956).

⁶³ 162 Neb. 683, 77 N.W.2d 215 (1956).

⁶⁴ *Robb v. Central Credit Corp.*, 169 Neb. 505, 100 N.W.2d 57 (1959); *Thomp-*

The Nebraska Legislature in 1957 attempted by legislative enactment to overrule the *Powell v. Edwards* line of cases as applied to the Installment Loan Act.⁶⁵ The amendment was, however, held invalid—not having met the Constitutional requirements for proper enactment.⁶⁶

B. THE INDUSTRIAL LOAN ACT

As already noted, the General Usury Act excepts industrial loan licensees from its operation.⁶⁷ The Industrial Loan Act found in sections 8-418 through 8-432, as revised in 1959, applies only to corporations organized or licensed under sections 8-401 through 8-417. It has no application to non-licensees because section 8-432 applies the penalties directly to industrial loan and investment companies which are by section 8-401 defined as organized under sections 8-401 through 8-417 or organized under the laws of the state and holding a certificate of approval from the Department of Banking. The Act seems to make no provision for foreign corporations.

The maximum allowable rate of interest is eighteen per cent on that part of the principal balance not in excess of \$1,000; twelve per cent on that part of the principal balance exceeding \$1,000 but less than \$3,000; and nine per cent on that part of the principal balance exceeding \$3,000. These rates must be computed strictly as simple interest and on the unpaid principal balance for the time actually outstanding,⁶⁸ may not be deducted or received in advance, and may not be compounded unless all or part of the loan contract

son v. Commercial Credit Equip. Corp., 169 Neb. 377, 99 N.W.2d 761 (1959); *State ex rel. Beck v. Associates Discount Corp.*, 168 Neb. 298, 96 N.W.2d 55 (1959); *Curtis v. Securities Acceptance Corp.*, 166 Neb. 815, 91 N.W.2d 19 (1958); *Nelson v. General Credit Corp.*, 166 Neb. 770, 90 N.W.2d 799 (1958); *Commonwealth Trailer Sales, Inc. v. Bradt*, 166 Neb. 1, 87 N.W.2d 705 (1958); *A-1 Finance Co. v. Nelson*, 165 Neb. 296, 84 N.W.2d 687 (1957); *McNish v. Grand Island Finance Co.*, 164 Neb. 543, 83 N.W.2d 13 (1957); *McNish v. General Credit Corp.*, 164 Neb. 526, 83 N.W.2d 1 (1957); *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956); *Powell v. Edwards*, 162 Neb. 11, 75 N.W.2d 122 (1956).

⁶⁵ Neb. Laws c. 194, § 1 (1957).

⁶⁶ *Thompson v. Commercial Credit Equip. Corp.*, 169 Neb. 377, 99 N.W.2d 761 (1959).

⁶⁷ NEB. REV. STAT. § 45-101 (Reissue 1960).

⁶⁸ NEB. REV. STAT. § 8-418 (Supp. 1959).

is the unpaid principal balance of a prior loan, in which case accrued but unpaid charges on prior loans may be included.⁶⁹

Loan splitting for the purpose of obtaining a higher rate of interest is prohibited.⁷⁰ Other subterfuges for the increase of rates would no doubt not be allowed just as they are not under the General Usury Act—the time price sale problem arising also and being dealt with in a similar way.⁷¹ Tender of payment by the borrower also should or should not be required according to the tests under the General Usury Act.⁷² The penalty for willful failure to comply with the provisions of the Industrial Loan Act is that the lender may collect only the part of the principal and accrued interest that exceeds \$1,000.⁷³

The penalties provided by the Act appear to be somewhat defective. Suppose that due to the size of the loan and the extraction of exorbitant interest there would nevertheless remain after the deduction of \$1,000 from principal and accrued interest the whole principal and the equivalent of more than legal interest. Would the lender be able to collect this unlawful amount after forfeiting \$1,000? The intention of the Act does not appear to be to leave such a violation without a penalty.⁷⁴

C. THE PERSONAL LOAN ACT

The General Usury Act, as noted earlier, excepts from its operation loans made by licensees under the Personal Loan Act found in sections 8-801 through 8-814.⁷⁵ The Personal Loan Act applies to loans of less than \$3,000 which are payable in two or more installments and on which the interest does not exceed nine per cent per annum.⁷⁶ Bank loans providing for interest less than nine

⁶⁹ NEB. REV. STAT. § 8-422 (Reissue 1954).

⁷⁰ NEB. REV. STAT. § 8-419 (Reissue 1954); *Jourdan v. Commonwealth Co.*, 170 Neb. 919, 104 N.W.2d 681 (1960).

⁷¹ See cases cited in note 18 *supra*.

⁷² NEB. REV. STAT. § 45-112 (Reissue 1960); see also cases cited in note 17 *supra*.

⁷³ NEB. REV. STAT. § 8-432 (Supp. 1959).

⁷⁴ Neb. Laws c. 23, § 11 (1959) changed the former penalty voiding the entire loan to the present penalty declaring void only the first \$1,000. The title states that its purpose in this respect is to *provide* penalties and to *change* penalties for certain violations. The amendment does not purport to allow for an evasion of any kind.

⁷⁵ NEB. REV. STAT. § 45-101 (Reissue 1960).

⁷⁶ NEB. REV. STAT. § 8-801(6) (Supp. 1959).

per cent or where the amount is more than \$3,000 remain subject to the General Usury Act.⁷⁷ The penalties apply only to registered banks and trust companies⁷⁸ who have obtained registration by agreeing to comply with the provisions of sections 8-801 through 8-814.

The Personal Loan Act provides for a maximum rate of interest of eighteen per cent on that part of the principal balance not in excess of \$1,000 and twelve per cent on that part of the principal balance exceeding \$1,000. These rates must be computed as simple interest on the unpaid balances of the principal amount actually received and retained by the borrower⁷⁹ and may not be deducted or received in advance.⁸⁰ Other than the above no further direct or indirect charge can be made except recording fees, costs of collection by judicial proceeding, and a reasonable amount of insurance at reasonable rates.⁸¹ Thus subterfuges for increase of rates are specifically prohibited.

The penalty for contracting for excessive interest is that no charges of any kind can be collected on the loan and if charges have been collected the lender must forfeit to the borrower all interest collected and an amount equal thereto.⁸² The problem of intent is similar to that under the General Usury Act⁸³ as is also the requirement of tender of payment by the borrower⁸⁴ and both would no doubt be dealt with in a similar manner as under the General Usury Act.

D. CREDIT UNIONS

Credit unions have been excepted from the operation of the General Usury Act⁸⁵ and are allowed to set their own rates not to exceed twelve per cent per annum or less on the unpaid balance

⁷⁷ OPS. NEB. ATT'Y GEN. 239 (No. 139, 1957); OPS. NEB. ATT'Y GEN. 298 (1956); OPS. NEB. ATT'Y GEN. 617 (1948).

⁷⁸ NEB. REV. STAT. §§ 8-806 and -814 (Reissue 1954).

⁷⁹ NEB. REV. STAT. § 8-806 (Reissue 1954).

⁸⁰ NEB. REV. STAT. § 8-808 (Reissue 1954).

⁸¹ NEB. REV. STAT. § 8-807 (Supp. 1959).

⁸² NEB. REV. STAT. § 8-814 (Reissue 1954).

⁸³ See cases cited in notes 14 and 15 *supra*.

⁸⁴ NEB. REV. STAT. § 45-112 (Reissue 1960); see also cases cited in note 17 *supra*.

⁸⁵ NEB. REV. STAT. § 45-101 (Reissue 1960).

of the loan, the rate to be determined by the board of directors.⁸⁶ No provision for forfeiture is provided and presumably the only remedy for violation would be for the Department of Banking to order the credit union to discontinue its illegal practices or order its dissolution.⁸⁷

IV. FORBEARANCE EXCEPTIONS TO THE GENERAL USURY ACT

A. REVOLVING CHARGE AGREEMENTS ACT

In sections 45-201 through 45-203 there is found a provision for a rate of interest to be charged on open accounts by agreements commonly called revolving charge agreements. The Act applies to a special kind of forbearance, namely agreements prescribing the terms of retail installment sales to be made pursuant thereto from time to time and wherein the seller does not retain a title or lien interest in the goods sold and the buyer's total unpaid balance is payable in installments over a period of time.⁸⁸ It is a special usury provision and for that reason controls over the General Usury Act provisions. It makes a specific exception to section 45-104 regarding unsettled accounts and to that extent, being an act complete in itself, it controls.⁸⁹

The Revolving Charge Agreements Act provides for a service charge not exceeding one and one-half percent monthly, computed on the unpaid balance from month to month. This service charge may not be computed on more than the unpaid balance at the beginning of the period for which the charge is made.⁹⁰ No service charge is permitted on balances in excess of \$500.⁹¹ Whether the service charge provided for in section 45-202 (3) may be compounded monthly seems unclear. Section 45-202 (1) prohibits charge of any further or other amount, but a reference to the charges allowed under section 45-202 (3) discloses only that the revolving charge agreement may provide for and the seller may then "charge, receive and

⁸⁶ NEB. REV. STAT. § 21-1714 (Supp. 1959).

⁸⁷ NEB. REV. STAT. § 21-1718 (Reissue 1954).

⁸⁸ NEB. REV. STAT. § 45-201 (3) (Reissue 1960).

⁸⁹ *Thompson v. Commercial Credit Equip. Co.*, 169 Neb. 377, 99 N.W.2d 761 (1959); *State ex rel. Taylor v. Hall*, 129 Neb. 669, 262 N.W. 835 (1935); *State ex rel. Hall County Farm Bureau*, 104 Neb. 838, 178 N.W. 846 (1920).

⁹⁰ NEB. REV. STAT. § 45-202 (Reissue 1960).

⁹¹ NEB. REV. STAT. § 45-201 (Reissue 1960).

collect" a service charge not exceeding one and one-half per cent monthly upon the unpaid balance under the agreement, no mention being made of what happens if the seller "charges" but does not immediately "receive and collect."

Willful and knowing violation of the provisions of the Revolving Charge Agreements Act results upon conviction in forfeiture of all service charges paid and cancellation of the outstanding indebtedness.⁹²

B. THE NEBRASKA INSTALLMENT SALES ACT

1. *Generally*

The court's almost unanimous exception of the time price sale from the operation of the usury laws⁹³ has given rise to considerable abuse. The abuse, thus developed, eventually resulted in the court's treating many time price sales as mere devices for evasion of the usury statutes⁹⁴ in turn making it rather difficult to determine whether in a given case a time sales price would be given recognition. The Nebraska Installment Sales Act found in sections 45-301 through 45-312 was enacted first of all to remedy this situation and secondly to control the abuse, accomplishing these two things not by abolishing the time price sale but by controlling the difference between the cash price and the time price. Thus the Nebraska Installment Sales Act is not a usury regulation in the real sense, since it does not control interest rates to be charged but regulates a well recognized exception to the usury statutes, the time price sale.⁹⁵ The regulation, however, is similar to a usury regulation.

The Nebraska Installment Sales Act applies to persons engaged in the business of selling goods to retail buyers under retail installment contracts and purchasers of those contracts. A retail installment contract is defined as an agreement evidencing a retail installment sale pursuant to which a buyer promises to pay in one or more deferred installments a time sale price for goods and pursuant to which the title to or lien in the goods is retained or taken by the seller as security for the payment of the retail installment contract.⁹⁶

⁹² NEB. REV. STAT. § 45-203 (Reissue 1960).

⁹³ See cases and annotations cited in note 25 *supra*.

⁹⁴ See cases cited in notes 40 through 43 *supra*.

⁹⁵ *Contra*, OPS. NEB. ATT'Y GEN. (No's. 43 and 65, 1959).

⁹⁶ NEB. REV. STAT. § 45-302 (Reissue 1960).

A license is required of all except banks, trust companies, industrial loan and investment companies, and Installment Loan licensees.⁹⁷ The penalties of the Act apply to non-licensses as well as licensees.⁹⁸

The rates allowed are found in section 45-305 and are expressed in terms of time price differential between a cash price and a time price. The rates as to motor vehicles are stated not in terms of size of outstanding debt but in terms of age of vehicle. The time price differential rate for instance is \$13 per \$100 per year on motor vehicles designed by the manufacturer (by model year) not more than four years nor less than two years prior to the year in which the sale is made. The rate is \$15 per \$100 per year on older vehicles. As to all other goods the rates are stated in terms of basic time price.⁹⁹ The seller may not collect charges in excess of those allowed by the Nebraska Installment Sales Act upon any retail installment contract. In other words the contract may not provide for interest in addition to the allowed time price differential. For overcharge of rates the consequence is that the contract is void as to the excessive time price differential, the first \$1,000 of authorized time price differential, and the first \$4,000 of principal.¹⁰⁰

It is to be noted that the Act does not apply to time price sale agreements when no lien interest is retained as security upon the goods sold.¹⁰¹ These contracts would appear to remain subject to the former rules determining when a time price will be recognized and to the usury acts as previously discussed. This appears to be a serious defect for though it is true that seller seldom would risk a sale without security he may circumvent regulation so long as he can find sufficient other property of the buyer upon which to take security. Although this practice is probably not now widespread it could potentially, in certain cases, allow for considerable evasion.

⁹⁷ NEB. REV. STAT. §§ 45-310 and -312 (Reissue 1960).

⁹⁸ NEB. REV. STAT. §§ 45-302(5), (10), and 45-311 (Reissue 1960).

⁹⁹ Since the rates in NEB. REV. STAT. § 45-305 (Reissue 1960) do not regulate interest on money according to present Nebraska decisions, it is submitted that they are not within the constitutional prohibition regarding special laws regulating interest on money. See cases cited in notes 25, 42, and 43 *supra*; NEB. CONST. art. 3, § 18. No position is taken on the wisdom of the classification.

¹⁰⁰ NEB. REV. STAT. § 45-311 (Reissue 1960).

¹⁰¹ NEB. REV. STAT. § 45-302(5) (Reissue 1960).

2. *The Previous Nebraska Decisions as Related to the Nebraska Installment Sales Act*

Keeping in mind the previous discussion regarding to what extent and under what circumstances the time price sale is subject to usury regulation and the fact that the Nebraska Installment Sales Act, since it continues the distinctions, does not eliminate the problem, the main issue now is whether and to what extent the former rules apply.

As we have seen, prior to the Nebraska Installment Sales Act it was necessary under the Nebraska cases to orally quote both a time price and a cash price to effectuate a valid time price sale. The Nebraska Installment Sales Act neither specifically continues nor expressly abolishes this requirement. It does, however, by section 45-303 require detailed disclosure of the terms in the retail installment contract before signature by the buyer. This section seems to contemplate that if disclosure is made as therein required an actual oral quoting of the cash and time price is not necessary. However, since the Act does not deal specifically with the problem in this regard it could be argued that a time price must still be orally quoted, the previous law remaining unchanged.

In many if not most transactions the Nebraska Installment Sales Act allows for higher rates than do the loan acts. Suppose for instance the time sale of a three year old automobile, that the buyer wishes to pay off the remaining purchase price of \$1,000, after trade-in, in installments over a one year period and that the finance company which is an industrial loan licensee, has directly participated in the negotiations—helping the buyer and seller arrive at an agreement favorable to itself. The allowed time price differential on this sale would be \$130. On the other hand if a loan is made the maximum rate is eighteen per cent on the unpaid balances for the time actually outstanding or a total of approximately ninety dollars. The question is can the parties negotiate and arrive at an agreement just as they do in the loan transaction, cast the agreement in the form of a time price sale, and receive the higher allowed rate? The Nebraska Installment Sales Act is silent on this question. Yet, as previously discussed, these so called tri-partite activities have been quite crucial in past decisions regarding the validity of the time sales price.¹⁰² Again the argument can be made that the finance company

¹⁰² *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956); *Nelson v. General Credit Corp.*, 166 Neb. 770, 90 N.W.2d 799 (1958).

may participate since the Act does not prohibit this. An opposing argument would be that the Act, since not specifically allowing participation by the finance company, intends that the previous precedents apply. In addition here, as distinguished from the case where the time price is not orally stated, we are unquestionably in the area of chattel-loan financing. Any buyer with the finance company representative and the seller on either side would think he was making two deals: first, the actual purchase, and second, borrowing money to finance the purchase price. He would view the seller's indorsement or guarantee of the paper as a favor assisting him in getting the loan and indeed the seller would so represent it. The buyer would from the beginning understand that his obligation was to run to the finance company. This is especially so if the paper is made payable at the finance company offices as is frequently done. Most chattel loans in fact come out of tri-partite negotiations. The buyer cannot buy until he knows he can get the money. The lender, since he wants security for his loan and because he wants to see that the money is applied to the purpose for which he lent it, will usually not lend without some contact with the seller.

Would the court in an instance like this see the substance of the transaction—keeping in mind that the finance company is able to dictate whether the contract is to be in the form of a retail installment sale or a loan? It should be remembered that the decisions stating that the court will look through the form to the substance were decided before the passage of the Nebraska Installment Sales Act at a time when the time sale was unregulated. At that time to not look through the form to the substance would have resulted in an unregulated transaction. Today, however, it would result merely in subjecting the illegality to another penalty, that is, from the penalty of the Nebraska Installment Sales Act to that of one of the loan acts. In either case the public is protected. In spite of this, however, the court should recognize the true nature of the transaction. The Nebraska Installment Sales Act should be held to make no change in the law in this regard and the transaction in this instance should be looked upon as a loan between the buyer and the finance company for the cash price. In other words the finance company should not be allowed to participate directly in the negotiations between the buyer and the seller whether by representative, telephone, or other means, and thus use the Nebraska Installment Sales Act as a device for circumventing the maximum interest provisions of the loan acts.

It is to be noted that the Nebraska Installment Sales Act makes no provision for extension of time of payment. The question may be asked as to whether in view of this fact extensions of time may be made under the Act. Inasmuch as this is a forbearance of money it is

within the General Usury Act.¹⁰³ The time price sale stands, the forbearance being on each installment as time on it is extended.

It is important to distinguish the above situation from the case where the whole contract is rewritten, the payments reduced, and maturity extended. Under such circumstance the whole thing would become a forbearance upon the original cash price because the holder of the contract is giving up his right to collect the money on the previous basis for a different right on a new and extended basis for a consideration. All of the elements of a time price sale cease to exist.¹⁰⁴

V. NATIONAL BANKS

The National Banking Act of 1864¹⁰⁵ applies the maximum interest provisions of the various state statutes to national banks. Not only does the Act apply to loans at the time of inception of the obligation but to discount of the paper afterwards as well.¹⁰⁶ Since, as we have seen, the Nebraska usury acts apply only to loans at inception the National Banking Act regulation of discount rate at which-ever is greater—seven per cent or one per cent in excess of the current discount rate on ninety day commercial paper—still governs national banks.

Since the basic Nebraska usury provision is the General Usury Act, that provision will prescribe the national bank rate. If, however, the national bank complies with the Installment Loan Act and obtains a license, the higher rate therein provided would become the "rate allowed by the laws of the State" within the National Banking Act of 1864.¹⁰⁷ Similarly the national bank could make loans under the Personal Loan Act by agreeing to comply with the provisions of sections 8-801 through 8-814. It could not, however, make loans under the Industrial Loan Act. That act applies only to corporations organized thereunder.¹⁰⁸

¹⁰³ NEB. REV. STAT. § 45-308 (Reissue 1960).

¹⁰⁴ OPS. NEB. ATT'Y GEN. (No. 157, 1959).

¹⁰⁵ 13 Stat. 108, 12 U.S.C. §§ 85-86 (1959).

¹⁰⁶ *National Bank of Gloversville v. Johnson*, 104 U.S. 271 (1881).

¹⁰⁷ 13 Stat. 108, 12 U.S.C. § 85 (1959); *Rockland-Atlas Nat'l Bank of Boston v. Murphy*, 329 Mass. 755, 110 N.E.2d 638 (1953); *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353 (1869); OPS. NEB. ATT'Y GEN. 82 (1941).

¹⁰⁸ NEB. REV. STAT. §§ 8-418 and -432 (Supp. 1959).

By obtaining licenses under the Nebraska acts the national bank would not, however, become subject to the penalty provisions thereof,¹⁰⁹ but would be subject to the Federal penalty provisions of section 86 of the National Banking Act—the Federal law being supreme.¹¹⁰ This section provides for forfeiture of interest in case of violation of the state provisions and repayment of twice such an amount of interest as has already been collected.

Since the Nebraska Installment Sales Act regulates that part of the selling price of chattels which lies between a *bona fide* cash price and a time price, it is not a regulation of interest. Nor is it a regulation of discount for the same reason. Thus sections 85 and 86 of the National Banking Act do not apply. Does the Nebraska Installment Sales Act then apply to national banks? The problem resolves itself into whether applying the Nebraska Installment Sales Act would subject the national banks to an unauthorized visitorial power within section 484 of the National Banking Act of 1864.¹¹¹ It is submitted that it would not. Although the visitorial power has been defined as the power "to control and arrest abuses and to enforce due observance of the statutes,"¹¹² the provision has also been limited. National banks are exempted from state legislation only in so far as it interferes with or impairs their efficiency in performing the functions by which they are designed to serve the Federal Government.¹¹³

¹⁰⁹ *Rockland-Atlas Nat'l Bank v. Murphy*, 329 Mass. 755, 110 N.E.2d 638 (1953); *Schuyler Nat'l Bank v. Gadsden*, 191 U.S. 451 (1903); *Stephens v. Monongahela Nat'l Bank*, 111 U.S. 197 (1884).

¹¹⁰ U.S. CONST. art. VI, para. 2.

¹¹¹ 13 Stat. 116, 12 U.S.C. § 484 (1959) provides that "no bank shall be subject to any visitorial powers other than such as are authorized by law, or vested in the courts of justice or such as shall be or shall have been exercised or directed by Congress"

¹¹² *Allen v. McKean*, 1 Fed. Cas. 489 (No. 229) (C.C.D. Me. 1833); *State v. First Nat'l Bank of Portland*, 61 Ore. 551, 123 Pac. 712 (1912).

¹¹³ *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353 (1869); *State v. First Nat'l Bank of Portland*, 61 Ore. 551, 123 Pac. 712 (1912).

VI. THE RIGHTS OF A HOLDER IN DUE COURSE OF A USURIOUS INSTRUMENT¹¹⁴

For purposes of the following discussion, assume in each instance that a negotiable promissory note has been given and that this note is usurious. Assume further that the usury does not appear on the face of the instrument and that it has been negotiated to one who took in good faith, for value, before overdue, without notice of infirmity or defect in title and honestly and reasonably thinking that the instrument was completely legal. In other words, assume the holder to be a holder in due course within the Uniform Negotiable Instruments Law¹¹⁵ (hereafter referred to as the N.I.L.). It is of course necessary that all these standards be met. Thus, if the usury appears on the face of the instrument, the holder, not having then met the standards necessary to status as a holder in due course, takes subject to the usury. The following discussion is applicable only where the holder qualifies as a holder in due course.

What does a holder in due course of a usurious instrument get? Since the enactment of the Uniform Negotiable Instruments Law, the question has never been clearly decided in Nebraska. Prior to the N.I.L. the Nebraska cases uniformly held that a *bona fide* purchaser before maturity, for a valuable consideration, and without notice of usury took free of the usury and could collect the whole amount including usurious interest.¹¹⁶ These cases arose under the General Usury Act which provides that the contract is not to be void for overcharge of interest, but that the lender can recover only the principal without interest.¹¹⁷ The cases seem manifestly correct in view of the obvious public policy of the usury statute to protect the public but at the same time not to penalize the lender and a

¹¹⁴ This portion of this article, in so far as it deals with the rights of the holder in due course, is mainly an application of Professor Frederick K. Beutel's article on the same subject. See Beutel, *The Interpretation of the N.I.L. and Statutes Declaring Instruments Void*, 83 U. PA. L. REV. 744 (1935).

¹¹⁵ The N.I.L. is found in NEB. REV. STAT. §§ 62-101 to -1,195 (Reissue 1958). NEB. REV. STAT. § 62-152 (Reissue 1958) prescribes the standards a holder must meet to be a holder in due course.

¹¹⁶ *Cheney v. Janssen*, 20 Neb. 128, 29 N.W. 289 (1886); *Sedgwick v. Dixon*, 18 Neb. 545, 26 N.W. 247 (1886); *Darst v. Backus*, 18 Neb. 231, 24 N.W. 681 (1885); *Evans v. De Roe*, 15 Neb. 630, 20 N.W. 99 (1884); *Cheney v. Cooper*, 14 Neb. 415, 16 N.W. 471 (1883); *State Sav. Bank v. Scott*, 10 Neb. 83, 4 N.W. 314 (1880); *Wortendyke v. Meehan*, 9 Neb. 221, 2 N.W. 339 (1879).

¹¹⁷ NEB. REV. STAT. § 45-105 (Reissue 1960).

fortiori not to penalize an innocent purchaser from the lender. The language of the General Usury Act plainly shows that usury is an affirmative defense which the borrower must prove.¹¹⁸ The results of these cases, it is submitted, would be the same as to the holder in due course after enactment of sections 55 and 57 of the N.I.L. which in this respect continue the former policy.¹¹⁹

As to personal loans by banks and trust companies, section 8-814 provides in substance that no interest may be collected on loans made under section 8-806 and in violation of sections 8-806 through 8-809, and if any has been collected the bank must forfeit to the borrower twice that amount. Section 86 of the National Banking Act of 1864 is similar in this respect. The provisions under these two statutes are very similar to section 45-105 as related to the holder in due course problem. That usury is a defense, however, is not here so clearly stated. Nevertheless the provision that twice the interest paid, if any, is to be forfeited is not such a variation as to change the essential public policy of illegalizing the consideration. N.I.L. section 57 cuts off this illegality in favor of the holder in due course.¹²⁰

As to loans made subject to but in violation of the Industrial Loan Act, section 8-432 provides a penalty to the effect that the lender is entitled to collect only that part of the total principal and accrued interest on the usurious loan that exceeds \$1,000. Although the penalty is here considerably greater than under either the General Usury Act or the Personal Loan Act, it is clear that the provision is still worded in terms of mere illegality when read together with section 8-418. The holder in due course is thus here also in his favored position cutting off the defense of usury.

As the Installment Loan Act now stands the provisions deal-

¹¹⁸ NEB. REV. STAT. § 45-105 (Reissue 1960) provides: "[I]f in any action on such contract, proof be made that illegal interest has been directly or indirectly contracted for, or taken, or reserved, the plaintiff shall recover only the principal"

¹¹⁹ N.I.L. § 55 appears as NEB. REV. STAT. § 62-155 (Reissue 1958) and provides: "The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument . . . for an illegal consideration" N.I.L. § 57 appears as NEB. REV. STAT. § 62-157 (Reissue 1958) and provides: "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

¹²⁰ Schlesinger v. Gilhooly, 189 N.Y. 1, 81 N.E. 619 (1907).

ing with forfeitures and penalties all make the loan "void."¹²¹ The problem here revolves around the meaning of this word. On the one hand the word "void" is a strong expression of legislative intent to protect the debtor class—the maker of the note—from exploitation by the creditor class. On the other hand, in N.I.L. section 57, there is a strong expression of legislative intent to protect the innocent party, the holder in due course. The loss to either party by judgment for the other is the same. The equities are thus equal and the expressed legislative intents are in conflict. The task now becomes that of determining which legislative intent is to prevail.

Unfortunately the Installment Loan Act is special as to illegality of loans but general as to contracts effected thereby while the N.I.L. is special as to negotiable instruments and general as to illegality. The rule that the specific controls the general is therefore useless. A more plausible solution would be to say that if there is a conflict the Installment Loan Act being a later enactment incidentally modifies the N.I.L. by a repeal by implication.¹²² An additional technical argument would be that there is no conflict because a void instrument is a legal "nothing" which N.I.L. sections 55 and 57 cannot bring to life.

It is important that the statutory construction here be not confused with that previously discussed. Such previously dealt with phrases as "forfeit interest paid and an equal amount" or "recover only the amount of principal in excess of \$1,000" provide penalties for exacting *illegal* consideration. Illegal consideration gives rise to defective title under section 55 of the N.I.L. which, as we have seen, is cut off by section 57 of the N.I.L. The term "void" is much more drastic and goes much further in that it purports to determine the very existence of a contract rather than simply dealing with rights and liabilities under an admitted contract.

On the meaning of the word "void" whenever used in the statute will also potentially hinge other rights such as whether third parties can set up usury, whether the usury can be waived, the effect of estoppel and whether it applies, and whether the borrower must tender legal interest and principal in order to receive equitable relief. Let us then consider its meaning.

¹²¹ Neb. Laws c. 194, § 1 (1957) repealing NEB. REV. STAT. §§ 45-154 and -155 (Supp. 1959) was declared unconstitutional in *Thompson v. Commercial Credit Equip. Corp.*, 169 Neb. 377, 99 N.W.2d 761 (1959). The statutes presently in effect are NEB. REV. STAT. §§ 45-137, -138, and -153 to -155 (Reissue 1960).

¹²² See *Thompson v. Commercial Credit Equip. Corp.*, 169 Neb. 377, 99 N.W.2d 761 (1959); *Union Pac. R. R. v. Sprague*, 69 Neb. 48, 95 N.W. 46 (1903).

First of all it may be said with assurance that "void" when used in connection with usury does not mean that the position of everyone concerned is to be as far as possible returned to what it was before the transaction took place. It is held that "void" under the Installment Loan Act means that the lender gets nothing and must return everything he has received whereas the borrower may keep the benefits he has received without paying for them.¹²³ No endeavor is made to return the parties to their original position. Section 45-155 produces this result.

The court went much further in *Commonwealth Trailer Sales v. Bradt*,¹²⁴ holding that usury under the Installment Loan Act is a defense purely personal to the borrower and his privies and that an attachment creditor cannot raise it, the borrower not having avoided the contract. The court thereby held that usurious contracts are not really void as the statute says but voidable. If this is true the provisions using the word "void" are not inconsistent with N.I.L. sections 55 and 57. The latter then would be given effect cutting off the usury which is then merely a defense.

When attacking the question, not from the point of view of whether a person should be allowed to defend on a basis of usury, but whether the lender should be allowed to recover on such an instrument, the tenor of the decisions seems to be somewhat different. The Nebraska Supreme Court has repeatedly stated that if a contract is usurious at its inception no subsequent transaction will cure it.¹²⁵ Whether the court intends the statement to apply only to refinancing and related transactions or whether it also applies to negotiations of the completed contract is not clear, the negotiation being also a "transaction."

Robb v. Central Credit Corp.,¹²⁶ in applying the Installment Loan Act penalty to a bank, strongly indicated that the negotiable instrument would be void even in the hands of a holder in due course.¹²⁷ The case is, however, very puzzling in two respects. First, the holder bank's status as a holder in due course was not argued in the briefs and as far as may be detected from the opinion

¹²³ *McNish v. General Credit Corp.*, 164 Neb. 526, 83 N.W.2d 1 (1957); *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960).

¹²⁴ 166 Neb. 1, 87 N.W.2d 705 (1958), noted in 38 NEB. L. REV. 827 (1959).

¹²⁵ *Nelson v. General Credit Corp.*, 166 Neb. 770, 90 N.W.2d 799 (1958); *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956) and 168 Neb. 298, 96 N.W.2d 55 (1959); *Curtis v. Securities Acceptance Corp.*, 166 Neb. 815, 91 N.W.2d 19 (1958).

¹²⁶ 169 Neb. 505, 100 N.W.2d 57 (1959).

¹²⁷ *Id.* at 516, 100 N.W.2d at 64.

was not decided by the court. Second, the fact that the holder bank was a national bank was seemingly overlooked by the court. National banks do not of course become subject to state usury penalty provisions for overcharge of interest under the state usury acts but are subject to the National Banking Act of 1864¹²⁸ which, since it is similar to section 8-814, would allow recovery in full if the national bank were a holder in due course as we have seen. Perhaps the decision can be explained by saying that there was a violation of not only an interest provision dealt with by the National Banking Act of 1864, but also of the section 45-138 provision dealing with the length of time for which the loan may be made—not covered in the National Banking Act. The bank is here to that extent subject to the state law, Federal law not having pre-empted the field. The state law here, not governing to the extent that it impairs the efficiency of the national banks to perform their functions, will be applied.¹²⁹ By this reasoning, the *Robb v. Central Credit Corp.* case is a direct holding that the holder in due course cannot cut off usury when the statute declares the contract void. In view of the above it seems likely that a note usurious under the Installment Loan Act would, in Nebraska, be held subject thereto even in the hands of a holder in due course.¹³⁰

It is clear that the rights of the holder in due course could likewise come into question in connection with instruments subject to the Installment Sales Act penalties. The problem would arise when a seller and finance company continue their old financing practice—giving negotiable notes and ignoring the provisions of the Act. The penalty here involved declares the contract void as to the excessive time price differential, the first \$1,000 of authorized time price differential, and the first \$4,000 of principal.¹³¹

It can be argued that the case for holding the holder in due course subject to the usury here is not quite so strong as it is under the Installment Loan Act because its forfeitures are considerably milder, declaring only part of the contract void.¹³² Thus the

¹²⁸ 13 Stat. 108, 12 U.S.C. §§ 85-86 (1959).

¹²⁹ *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353 (1869); *State v. First Nat'l Bank of Portland*, 61 Ore. 551, 123 Pac. 712 (1912).

¹³⁰ The attorney general's office is in accord with this view. See OPS. NEB. ATT'Y GEN. 549 (1941), citing *Cuneo v. Bornstein*, 269 Mass. 232, 168 N.E. 810 (1929), a leading case also cited in *Robb v. Central Credit Corp.*, 169 Neb. 505, 100 N.W.2d 57 (1959). *Contra*, *Schlesinger v. Gilhooly*, 189 N.Y. 1, 81 N.E. 619 (1907).

¹³¹ NEB. REV. STAT. § 45-311 (Reissue 1960).

¹³² *Schlesinger v. Gilhooly*, 189 N.Y. 1, 81 N.E. 619 (1907).

Legislature must have intended to give less protection to the installment buyer than to the installment borrower. That being so the *bona fide* purchaser should be in a better position. It is difficult to understand how an instrument would be so utterly void in part as to be uncollectible as to that part even by a holder in due course and be completely valid as to the remainder allowing recovery even to guilty parties on the transaction. The indication then is that by "void" the Legislature here meant something similar to "voidable" and that as against a holder in due course usury would be merely a defense cut off by N.I.L. section 57. This position is somewhat strengthened by the meaning given the word "void" in *Commonwealth Trailer Sales, Inc. v. Bradt*.¹³³

On the other hand it may be argued that the forfeitures here are not really milder for in the overwhelming majority of cases the whole transaction will be void. Only in those cases where the forfeitures would extend beyond protection of the buyer and into the area of punishment causing hardship to the lender disproportionate to the wrong is he allowed to collect anything. There is no reason why the Legislature could not have intended those remaining transactions to be absolutely void in part and valid as to the remainder.¹³⁴ If there is a conflict the Nebraska Installment Sales Act, being the later general enactment, incidentally modifies N.I.L. sections 55 and 57. This position is somewhat strengthened by *Robb v. Central Credit Corp.*¹³⁵ and a line of cases stating that a contract usurious at its inception is not cured by any subsequent transaction.¹³⁶

It can be readily seen that the problem is even more confusing here than it is under the Installment Loan Act. There, just as here we have an expression of legislative intent to protect the debtor class against exploitation counter-balanced by a legislative intent to protect the holder in due course. Here just as there the equities are equal. Here, however, as distinguished from the situation under the Installment Loan Act, there is added an expression of legislative intent to not cause undue hardship to the lender. The penalty under the Installment Sales Act must for that reason in any case be considered less severe than those under the Installment Loan Act. In all those cases, though few there may be, in which the whole transaction is not declared void the penalty under the Installment Sales

¹³³ 166 Neb. 1, 87 N.W.2d 705 (1958).

¹³⁴ *McCormick v. Fallier*, 223 Ala. 80, 134 So. 471 (1931); *Baker v. Butcher*, 106 Cal. App. 358, 289 Pac. 236 (Dist. Ct. App. 1930).

¹³⁵ 169 Neb. 505, 100 N.W.2d 57 (1959).

¹³⁶ See cases cited in note 125 *supra*.

Act is lighter. In view of this fact and in view of the fact that "void" even as used in the Installment Loan Act may be construed as something more nearly like "voidable" the holder in due course might well prevail in spite of the penalties in the Nebraska Installment Sales Act.¹³⁷

VII. WHO MAY SET UP USURY

The Nebraska Supreme Court's frequent holding that usury is a defense personal to the borrower, his privies, and sureties¹³⁸ is proper where the statute makes usury a defense, or illegal, or the usurious contract voidable. The borrower may wish to keep the contract, supposing it to be advantageous to him. This is left within his discretion by statute and no one else should be allowed to exercise it. Where, however, the statute declares the contract "void" the plain words leave nothing to discretion, and the somewhat different result that the lender could have no recovery on the contract in any case regardless of whom he chooses to sue might be expected to follow. *Commonwealth Trailer Sales, Inc. v. Bradt*,¹³⁹ which was decided under the Installment Loan Act, however, holds to the contrary. The court in holding that "void" means "voidable" refused to extend the thus construed "defense" of usury beyond the borrower, his privies, or sureties to an attachment creditor who has an interest in the property, has not consented to the usury, and will not by the defense be unjustly enriched.¹⁴⁰ The case seems to be decided upon prior holdings without regard to the different wording employed in the Installment Loan Act.

There are those situations in which third persons ought not in any case be allowed to complain of usury as a matter of public policy. Most of these cases lie in the area of consent or estoppel. The purchaser of land subject to or assuming a mortgage should not be heard to complain since he took the mortgage into consideration when he purchased.¹⁴¹ Were it otherwise the usury statutes could be used to obtain a windfall by avoiding just obligations.

¹³⁷ *Baker v. Butcher*, 106 Cal. App. 358, 289 Pac. 236 (Dist. Ct. App. 1930); *Schlesinger v. Gilhooly*, 189 N.Y. 1, 81 N.E. 619 (1907); *contra*, *McCormick v. Fallier*, 223 Ala. 80, 134 So. 471 (1931).

¹³⁸ *Gilcrist v. Wright*, 167 Neb. 767, 94 N.W.2d 476 (1959); *First State Bank of Edward v. Niklasson*, 116 Neb. 713, 218 N.W. 744 (1928); *Male v. Wink*, 61 Neb. 748, 86 N.W. 472 (1901); *Cheney v. Dunlap*, 27 Neb. 401, 43 N.W. 178 (1889); see Annot., 70 A.L.R.2d 1409 (1960).

¹³⁹ 166 Neb. 1, 87 N.W.2d 705 (1958).

¹⁴⁰ See 38 NEB. L. REV. 827 (1959).

¹⁴¹ See Annot., 21 A.L.R. 495 (1922).

Also lying in the area of estoppel would be those cases in which the borrower knows that the contract is usurious at the time he enters into it, wishing to use the usury laws for the fraudulent purpose of evading liability. The courts in such instances properly deny to the borrower the benefit of the usury penalty provision.¹⁴²

VIII. CONCLUSION

The method of solving usury problems arising throughout the years has been to carve exceptions out of the General Usury Act instead of so amending the Act as to remedy the problem. The Installment Loan Act, for example, was enacted because it was not economically feasible to make small loans on a commercial basis at rates of nine per cent. The Personal Loan Act, the Industrial Loan Act, and the Revolving Charge Agreements Act were enacted for similar reasons. In view of the many exceptions one might well wonder whose transactions are still governed by the General Usury Act. The private individual, who seems to be practically the only one, may well ask why he is not allowed to charge a higher rate on certain types of loans.

There are probably two criticisms that can be leveled against the construction of the Nebraska usury statutes. First, why were not some of the loan acts combined? Subterfuges engaged in are likely to be similar whether the financier is a small loan licensee, an industrial loan company, or a bank. All of the acts are of the installment variety thus similar regulation is required. Qualifications could, of course, be made to the extent that differences in types of business require. Secondly, it would seem desirable that the usury provisions dealing with the allowed rates and penalties for overcharge of interest be separate from the licensing and regulatory provisions and be so constructed as to be of more general application. The rates allowed, though general in application, could still be constructed so that transactions of equal risk and expense of administration would return equal profit to the lender. Regulation of other undesirable practices, provisions for licensing and inspection, disclosure requirements, and other desired control would be dealt with in another place.

A rather different solution has been employed to cope with the time price sale problem. The Nebraska Installment Sales Act regu-

¹⁴² *Gund v. Ballard*, 73 Neb. 547, 103 N.W. 309 (1905); see Annot., 63 A.L.R. 962 (1929).

lates elements of the sale price of the goods rather than the loan part of the transaction. The theory here is to regulate the exception rather than to bring the exception within the rule. In view of the rather acute time price sale problem and the uncertainty with which these transactions were burdened it is submitted that this was a step in the right direction. The principle of this Act is sound under the present Nebraska decisions.

Two amendments appear advisable at the present time. First, all time price sales should be subject to the provisions of the Nebraska Installment Sales Act not just those in which an interest in the chattel is reserved in the buyer as security as is now the case. This would eliminate the possibility of evasion by taking liens merely on other property of the buyer. Second, it would appear advisable that the holder in due course problem be eliminated. The rather ambiguous word "void" should be stricken from the penalty provisions wherever appearing and the penalties drafted rather in terms of either forfeitures or defenses. Other than the above, basic amendments are probably not advisable at this time in view of the fact that the effectiveness of the Nebraska Installment Sales Act has yet to be determined.

Levi H. Goossen, '62